



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 24, 1995

Mr. Jeffrey J. Horner
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR95-197

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 31650.

The Galena Park Independent School District (the "school district"), which you represent, has received a request for a copy of a certain insurance policy. Specifically, the requestor seeks "a copy of the Builders Risk Form which was in effect on [March 1, 1994, through March 1, 1995] insuring Galena Park ISD and their contractor, Tellepsen Corporation." You have submitted the requested information to us for review and ask whether sections 552.101 and 552.110 of the Government Code except it from required public disclosure.

Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. We have received a response from Tellepsen Corporation ("Tellepsen") and attorneys representing Thomas Howell Group (USA), Inc., Great Lakes Reinsurance UK PLC, and Phoenix Assurance PLC (the "insurers"). The respondents claim that the requested information contains proprietary or trade secret information that is not subject to required public disclosure under the Open Records Act. Specifically, the respondents claim that sections 552.101, 552.104, and 552.110 of the Government Code except the requested information from required public disclosure.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The respondents cite no authority in conjunction with their assertion of section 552.101, nor do you. In addition, we are not aware of any law that makes the submitted information confidential. Accordingly, we conclude that the school district may not withhold the requested information under section 552.101 of the Government Code.

Next, we address the respondent's claim that section 552.104 excepts the requested information from required public disclosure. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990).¹ We do not understand that the requested information relates to a competitive bidding process, nor have we been so advised. Accordingly, we conclude that the school district may not withhold the requested information under section 552.104 of the Government Code.²

Finally, we address whether section 552.110 of the Government Code excepts the requested information from required public disclosure. Section 552.110 protects the property interests of private persons by excepting from required public disclosure trade secrets.³ The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing,

¹Ordinarily, section 552.104 cannot be asserted to protect a governmental body's "competitive advantage" because a governmental body cannot be regarded as being in competition with private enterprises. *See* Open Records Decision No. 463 (1987) at 2. *But see* Open Records Decision No. 593 (1991) (concluding that governmental body might be deemed, under certain circumstances, to be "competitor" in marketplace).

²Section 552.104 is designed to protect only a governmental body's interests. *See* Open Records Decision No. 541 (1990) at 4-5. Thus, it may not be asserted to protect the interests of third parties.

³Section 552.110 also excepts from disclosure commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. *See* Open Records Decision No. 592 (1991). As noted above, neither you nor the respondents have cited, nor are we aware of, any statute or judicial decision that makes the requested information privileged or confidential.

treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business* A trade secret is *a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we must accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law.⁴ Open Records Decision No. 552 (1990) at 5.

We have examined the arguments submitted to us for review. The respondents all rely on the arguments submitted by the attorneys for the insurers. These arguments are conclusory and fail, among other things, to indicate the extent to which the requested information is known outside of the company, the extent of measures taken to guard the secrecy of the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others. You have provided no arguments supporting your assertion of section 552.110. We conclude, therefore, that you and the respondents have failed to make a prima facie case that the requested information contains trade secrets. Accordingly, the school district may not withhold the requested information under section 552.110 of the Government Code and must release it in its entirety.

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

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Enclosures: Submitted documents

Ref.: ID# 31650

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